Supreme Court of the Hawaiian Islands. October Term, 1889.

ELIZA MEEK, A MINOR, BY G. S. HOUGHTAILING, HER GUARDIAN, VS. ASWAN, DOING BUSINESS AS HOP SANG WAI CO.,

BEFORE JUDD, C.J., M'CULLY, PRESTON, BICKERTON AND DOLE, JJ.

Opinion of the Court per Judd, C. J.

This is an action of assumpsit for rent. The plaintiff recovered in the Police Court of Honolulu and defendant appealed to the Supreme Court. After a mixed jury had been empannelled and sworn and the plaintiff had opened the case, the defendant's counsel moved to dismiss on the ground that the action was improperly brought in the name of the minor by her guardian, whereas the complaint should read G. S. Houghtailing, guardian of Eliza Meek.

The Court held that the complaint was defective in respect to the proper party plaintiff and therefore dismissed the case.

The correctness of this ruling is brought to this Court by defendant's bill of exceptions.

We think the Court below erred in holding that the complaint was improperly brought by Eliza Meek, a minor, by G. S. Houghtailing her guardian.

A minor cannot sue in his own name. "An infant, not having the power to appoint an attorney, must in all cases where he is plaintiff, sue by guardian or *prochein amy*." Bingham on Infancy, page 118.

In the Court of King's Bench the form is, J. S. per A. B. *guardianum suum ad hoc per curiam specialiter admissum queritur*, etc., J. S. by A. B. his guardian specially admitted by the Court complains etc. *Id.* p. 120.

When a probate guardian has been appointed for a minor, the guardian has by the statute all the powers which a next friend or guardian *ad litem* has in respect to a suit. *Fox vs. Minor*, 32 Cal. 112.

The statute is, (Compiled Laws, p. 444). "The guardian" * * * "shall appear for and represent his ward in all legal suits and proceedings, unless another person is appointed for that purpose, as guardian or next friend."

In the case at bar, a guardian for the minor had been appointed by the Probate Court. How, then, should the suit be brought? The purpose of it was to collect rent due for use of the minor's land. It was the suit of the minor, and not that of the guardian. But the minor cannot make a contract with an attorney to bring a suit, and cannot personally bring a suit; therefore, he must act through some one that is his guardian, if he have one, or by some one specially appointed by the Court. The suit is nevertheless that of the minor.

Analogous to this is a suit where the suitor is represented by an attorney in fact. The principal brings the action by the attorney in fact.

All the forms in the books on pleading correspond with this view. See Chitty's Practical Forms, Chap. 4. "Actions by and against infants." "If the infant be plaintiff the process will be in his name, and not in the name of the guardian or *prochein amy*."

In *Judson vs. Blanchard*, 3 Conn. 580, the action describes the plaintiff as "A.B. a minor, under twenty-one years of age suing and prosecuting her complaint by C. D., her next friend."

We are aware that a different practice has in many instances been followed in this Court without objection, and suits have been instituted in the form of A. B., guardian of C. D. But the general rule is that the suit must be brought by the infant by his guardian or next friend.

The statute does not confer the right upon the guardian to sue in his own name, as the Statute of Bankruptcy does upon the assignee.

He is "to appear *for and represent his 'ward'* in all suits" &c.

The following authorities sustain our position. Schouler's Domestic Relations, p. 462.

"The guardian must sue in general in the name of his ward and not in his own name."

Hoar vs. Harris, 11 Ill., 24. The Court per Caton, J. say:

"The bill is filed by Harris as guardian, to compel the conveyance of a town lot to his ward. Authorities are "hardly required to show that, by the well established rules of chancery law, the bill should have been filed in the name of the ward, by his guardian or next friend. But it is argued that the statute, which reads, "Guardians by virtue of 'their office as such, shall be allowed in all cases to prosecute and defend for their wards.' While this section may give the control of the proceeding to the guardian, it makes no change as to the parties to the suit. As formerly, the proceeding must still be conducted in the name of the parties really interested, as much as if they were adults. Only by making them parties could they be bound by the adjudication."

In *Newton vs. Nutt*, 58 N. H. 601, the Court say:

"The guardian's duties entitle him to the possession of the ward's property, but his possession is the possession of the ward in whom the legal title remains. The power of the guardian is a naked trust not coupled with an interest. When the right of action depends upon the possession merely and the possession of the property is actually with the guardian, the suit may be in the guardian's name. So, too, if the action is on a contract to be performed with the guardian personally, or for the payment of money to him by name.

"But debts and demands, generally, in which the ward has a direct beneficial interest, should be sued in the name of the ward by his guardian."

In *Hutchins vs. Dresser*, 26 Me. 76,—the suit was for wages due the minor brought by plaintiff, describing himself as guardian of the minor. The Court said: "the provision of the statute, c. 110. Sec. 21, that a guardian may 'demand, sue for and receive all debts due' to the ward, cannot be construed to authorize him to maintain a suit in his own name to recover them. That such was not the intention is apparent from the last clause of that section, which provides, that he shall appear for and represent his ward in all legal suits and proceedings. In such cases he has no personal interest in the suit; is but a statute agent, which may be changed pending the suit without abating it."

In *Fox vs. Minor*, 32 Cal. 112, the plaintiff was "Bernard S. Fox, guardian of the person and estate of Catherine Foley, a minor." The suit was to recover money due the ward by a former guardian.

In this case, the Court per Sawyer, J. say: that though executors and administrators may sue in their official capacity, "it is because they are strictly and teachnically representatives of the deceased, while guardians are not technically representatives of anybody. They simply stand in the position of protectors. The guardian is the counsel assigned by operation of law to conduct the suit."

The Court held that the suit on the bond could only be maintained in the name of the infant, the real party in interest and dismissed the action. Judge Sanderson dissented: He held with the Court that the action should have been brought in the name of the ward by her guardian, but that the omission of the name of the minor could be supplied by amendment and the suit not dismissed.

With these authorities construing guardian's statutes similar to our own, we are of opinion that the complaint in the lower Court was correct.

We wish to say, further, that the objection to the complaint, even if tenable, should not have been visited with a dismissal, but an amendment should have been allowed.

We held in *Robello vs. Wong Quing*, 5 Hawn. 98, that it is too late to dismiss a case on appeal for a defect in the summons, when no notice was taken of the defect in the lower Court. It does not appear, however, that any amendment was asked for.

The exceptions are sustained and the case is reinstated for trial on appeal in the Supreme Court.

A. Rosa, Attorney for Plaintiff; C. Creighton and S. K. Kane, Attorneys for Defendant.

December 6th, 1889.

Supreme Court of the Hawaiian Islands. In Banco. October Term, A. D. 1889.

APOLO VS. KAUO.

Exceptions from Circuit Court, Fourth Judicial Circuit, Dole, J., Presiding.

BEFORE JUDD C. J., M'CULLY J., PRESTON J., BICKERTON J., DOLE J.

Opinion of the Court by Dole J.

The declaration in this case, which was originally brought before the District Justice of Kawaihau, Island of Kauai, is in the nature of an action of trespass, and claims two hundred dollars damages for the unlawful removal by the defendant of a house belonging to the plaintiff from the plaintiff's land.

It was shown in evidence that Paia, the plaintiff's father-in-law, owned a house stationed on the land of another which he was forced to remove by the owner of the land; the plaintiff assisted him to take it down and transport the material to his own (the plaintiff's) land and rebuild it there, furnishing a considerable amount of labor and money toward the work. The house was thence forward occupied by Paia together with the plaintiff and his family, a period of about six years. In February 1888, Paia, wishing to remove to another island, sought a purchaser for the house and eventually sold it to Kauo, the defendant, on the 11th of February, for thirty dollars and received the money but delivered no deed. In the meantime, the plaintiff had arranged to purchase the house from Paia on the 8th of February for ten dollars, which agreement was carried out on the 13th by the payment of the money and the execution of a bill of sale for the house to plaintiff's wife. On the next day the defendant took the house down in spite of plaintiff's protests and removed therefrom goods belonging to plaintiff to an exposed place where they were injured by the elements.

At the trial the Court directed the jury to find for the plaintiff and to assess damages according to the evidence, on the ground that the sale of the house was the sale of an interest in "lands, tenements or hereditaments," and by our Statute of Frauds (Civil Code Sec. 1053) required a writing in order to its validity. The case comes to us upon defendant's exceptions to this instruction. The question before us is whether, under the circumstances of the case, the house was a part of the realty, or whether it was a chattel belonging to Paia, which he might dispose of by a verbal sale.

It is undoubtedly the law by weight of authority, that where one builds a house on the land of another, the house becomes a part of the realty and the property of the owner of the land, unless there is an agreement, express or implied, between the parties that it is removable by the builder, in which case, the house is personal property and may be sold without a writing. (Thompson *vs.* Love, 42 Ohio 61; Dame *vs.* Dame 38 N. H. 430; Howard *vs.* Fessenden, 14 Allen 123; Smith *vs.* Benson, 1 Hill 176; Ford *vs.* Cobb, 20 N. Y. 349-350; Curtis *vs.* Hoyt, 16 Conn. 164-165; Washburn *vs.* Sprout, 16 Mass. 448; Murphy *vs.* Marland, 8 Cush. 578; Milton *vs.* Colby, 5 Met. 81.)

This question if it was open at all under the pleadings, was a question for the jury to determine and not for the Court, but we are of the opinion that the plaintiff by his declaration, in which he claims the ownership of the house through the sale to his wife above referred to, thus recognizing the house as the personal property of Paia, made it improper for the Court to consider whether the house was a part of the realty. The declaration made it personal property, and as such must the issue between the parties be disposed of.

We therefore consider that the instruction of the Court on this point was incorrect, and sustain the exception thereto and a new trial is ordered.

W. O. Smith for plaintiff; A. Rosa for defendant.

December 9th, 1889.

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